Supreme Court, U.S.

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No. 00-___

In The

Supreme Court of the United States

CHRISTOPHER M. FEIST and
ANDREW N. SCHWARTZ, CHAPTER 7 TRUSTEE,

Petitioners,

v.

CONSOLIDATED FREIGHTWAYS CORP.,
t/a CF MOTOR FREIGHT,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To prevail on a motion to substitute the bankruptcy trustee as real party in interest under Fed.R.Civ.P. 17(a) for the purpose of pursuing a personal injury action for the benefit of the plaintiff's creditors, does the plaintiff have a burden to "eliminate . . . doubts" whether he had made "an honest mistake" in bringing the personal injury action initially in his own name – where the latter test appears in the Advisory Committee Note but not in the Rule itself, and the burden of proof imposed is inconsistent with the Rule, the Note, and this Court's cases?

2. Should a finding of the bankruptcy court that the debtor/plaintiff had "committed no fraud" in omitting a personal injury cause of action from his schedule of assets be given collateral estoppel effect by a district court when ruling on a motion to substitute the bankruptcy trustee as real party in interest under Fed.R.Civ.P. 17(a) for the purpose of administering that personal injury action for the benefit of the plaintiff's creditors?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties – petitioner Feist (the plaintiff in the district court, debtor in bankruptcy court, and an appellant below), petitioner Schwartz (the Chapter 7 trustee, real party in interest in the district court, and an appellant below) and the respondent corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHRISTOPHER M. FEIST and ANDREW N. SCHWARTZ, CHAPTER 7 TRUSTEE, respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit filed on May 10, 2000, affirming the district court's order granting judgment on the pleadings.

OPINIONS BELOW

The Third Circuit's memorandum opinion (per Alito, J., with Nygaard, J., and Gibson (8th Cir.), J.) was filed May 10, 2000. It is not published, but is noted at 216 F.3d 1075 (table). It appears in the Appendix, at App. 1-6. The district court's memorandum and Order (Robert F. Kelly, J.) dated March 31, 1999, is published at 100 F.Supp.2d 273,[1] and will be found in the Appendix, at 14-31. The district court's order denying petitioner's motion for summary judgment is found at App. 13.

The unpublished Order of the United States Bankruptcy Court (Bankr.E.D.Pa., Scholl, J.) reopening the bankruptcy case is reprinted in the Appendix, at 12; filed June 18, 1998, it is not published. Chief Judge Scholl's explanatory statements on the record at the conclusion of the evidentiary hearing that day are found in Appendix 7-11.

[1] It is also available on the district court's website at <http://www.paed.uscourts.gov/opinions/99D0256P.HTM>.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit affirming the dismissal of petitioner Feist's civil action was filed and entered on May 10, 2000. A timely petition for rehearing was denied by Order dated August 10, 2000. Appendix 32-33. On November 1, 2000, under No. 00A370, Justice Souter granted an extension of time until January 5, 2001, for the filing of this petition. The petition is being filed on or before that date. *See* Rules 13.1, 13.3, 13.5. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

TEXT OF FEDERAL STATUTE AND RULES INVOLVED

The Bankruptcy Code, title 11 of the United States Code, provides, in pertinent part:

> **§ 350 Closing and reopening cases**
>
> (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.
>
> (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 350. Rule 5010 of the Rules of Bankruptcy Procedure provides:

> A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a Chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a

> trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

The Federal Rules of Civil Procedure provide, in pertinent part:

> **Rule 17. Parties Plaintiff and Defendant; Capacity**
>
> **(a) Real party in interest.** Every action shall be prosecuted in the name of the real party in interest. . . . No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time as been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

STATEMENT OF THE CASE

This petition arises out of the Third Circuit's affirmance of the district court's order granting judgment on the pleadings in a personal injury action, rather than allowing substitution of the real party in interest, a bankruptcy trustee (co-petitioner in this Court), who sought to intervene in order to administer the civil action for the benefit of the plaintiff-petitioner's creditors.

a. The course of proceedings

Petitioner Feist (sometimes hereinafter simply "petitioner") suffered a significant personal injury before filing for bankruptcy under Chapter 7. In the bankruptcy proceedings petitioner freely disclosed the injury, reporting that he was receiving worker's compensation, but he failed to list his cause of action against respondent (a third party) as an asset. The petitioner trustee (hereinafter, sometimes "the trustee") reported Feist's bankruptcy as a "no-asset" case, and the bankruptcy court granted petitioner a discharge without the creditors' receiving anything. Months later, petitioner sued respondent for damages in the United States District Court for the Eastern District of Pennsylvania. A year later, respondent moved for judgment on the pleadings in the personal injury action for lack of standing, asserting that petitioner's claim was the sole property of the bankruptcy estate.

The former trustee, petitioner Schwartz, moved the bankruptcy court to reopen the Chapter 7 case, to pursue and administer petitioner's personal injury recovery for the benefit of the creditors. The bankruptcy court obliged, finding – after a full hearing at which respondent, the alleged tortfeasor, fully participated; *see* App. 7-11 – that petitioner, as debtor, had "committed no fraud" in the bankruptcy and that respondent's objections were "self-serving" and "lack[ed] merit." App. 12. The U.S. Trustee thereupon reappointed petitioner Schwartz as Chapter 7 trustee to pursue the personal injury action in district court.

Meanwhile, petitioner Feist opposed respondent's district court motion and filed a motion to amend the complaint so as to substitute the trustee as plaintiff under Fed.R.Civ.P. 17(a) as the real party in interest; the trustee also moved to be substituted. The district court allowed further discovery. Both petitioners then moved for partial summary judgment on the issue of Feist's good faith in initiating the action in his own name, on the basis of the bankruptcy court's prior finding of "no fraud." On November 13, 1998, the district court denied petitioner Feist's motion for summary judgment. App. 13. On November 23, 1998, the district court convened its own evidentiary hearing on the pending motions of respondent to dismiss and of petitioner to amend and substitute the real party in interest, at which petitioner testified. On March 31, 1999, the district court granted respondent "judgment on the pleadings," App. 14, not for lack of standing, App. 16-17, but because the suit was not initiated by the "real party in interest." *See* App. 15-31 (opinion). The court ruled that petitioner had not "eliminated . . . doubts" as to whether he had made "an honest mistake," App. 29, in bringing the personal injury action in his own name. The opinion states repeatedly that this was petitioner's burden to establish. App. 19, 28, 29, 30. All remaining motions, including the trustee's intervention application and motion for partial summary judgment, were dismissed as moot.

Both petitioners appealed. The trustee also participated in petitioner's appeal as an amicus. The two appeals were consolidated. In a not-for-publication opinion filed May 10, 2000, the Third Circuit affirmed. App.

1-6. The court ruled that to prevail on a motion to substitute the trustee as "real party in interest" for himself as plaintiff, the petitioner had a burden to prove that he had initially filed in his own name "in good faith" and as the result of "an honest and understandable mistake." (This standard appears not in Rule 17(a) itself, but in the Advisory Committee Note.) The court found that the district court had not abused its discretion in finding that petitioner had not satisfied this burden.

The Third Circuit further ruled that the bankruptcy court's finding was not entitled to preclusive effect:

> because a finding by the bankruptcy court that [petitioner] Feist had not committed fraud when he failed to list his cause of action against [respondent] CF as an asset in his bankruptcy or when he told the trustee that he had no personal injury claims is not the same thing as a finding that Feist did not make an honest mistake in filing the [civil] action in his own name [some five or six months later].

App. 6 n.1. The court below made no mention at all of the petitioner trustee's consolidated appeal or of his arguments as amicus curiae on behalf of the creditors' interests. Rehearing was denied. App. 32-33. This joint petition follows.

b. Statement of Facts

Because this case was decided on motion under Fed.R.Civ.P. 12(c), this Statement recites the facts as alleged in the complaint, which must be taken as true for purpose of these proceedings. See *Sutton v. United Air*

Lines, Inc., 527 U.S. 471, 475 (1999) (citing *United States v. Gaubert*, 499 U.S. 315, 327 (1991)); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 633 (1999).

On August 23, 1995, petitioner Feist, then 25 years old, was working for Jay Telephone Vending Co., where he was assigned to assist in unloading a shipment delivered by an agent of the respondent in one of respondent's trucks. The truck driver directed petitioner to grip a partially unloaded pallet bearing several hundred pounds of telephone equipment. The driver then pushed the pallet off the truck in such a way that it fell to the ground while petitioner was attempting to hold it, causing him severe and potentially permanent back injuries which have disabled him from working. Petitioner's injuries were a direct and proximate result of respondent's negligence, by and through its agent, the driver. CA3 App. 005-008. Petitioner applied for and received an award of worker's compensation, but did not sue respondent or anyone else.

On January 16, 1997, petitioner filed a voluntary Chapter 7 bankruptcy petition in the Eastern District of Pennsylvania, listing some $6125 in assets and about $156,000 in debts, much of them on credit cards. CA3 App. 029, 044. He reported that his income in the last two years had come entirely from worker's compensation, CA3 App. 046, and that he had no contingent or unliquidated claims, or other unlisted property. CA3 App. 028-029. He confirmed this state of affairs to petitioner Schwartz, the Chapter 7 trustee, at the first meeting of creditors, held February 24, 1997, pursuant to 11 U.S.C. § 341(a), stating that he was not aware of any claims he might have. The bankruptcy court granted him a full

discharge on April 30, 1997, finding a "no-asset" case, and closed the bankruptcy case on May 9.

Over two and a half months later, on July 21, 1997, petitioner Feist, in his own name, filed the instant civil action for damages against respondent in the district court for the Eastern District of Pennsylvania, having retained counsel for that purpose on May 30, 1997. About a month before the case was listed for trial, in early June 1998, respondent filed a motion for additional discovery, alleging it had recently learned of the bankruptcy proceeding. This was granted. Respondent also moved the district court pursuant to Fed.R.Civ.P. 12(c) for judgment on the pleadings, asserting as a matter of law that petitioner lacked "standing" to bring or pursue the civil action.

Petitioner Feist notified petitioner Schwartz, the former trustee, who promptly moved the bankruptcy court pursuant to R.Bankr.P. 5010(b) to reopen the Chapter 7 case for the purpose of administering the personal injury action as an asset for the benefit of the creditors, with any surplus going to petitioner.[2] After a full evidentiary hearing before Chief Judge Scholl, the bankruptcy court

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[2] This was the correct procedure under the circumstances. See *Stein v. United Artists Corp.*, 691 F.2d 885, 893-94 (9th Cir. 1982) (per Kennedy, J.). Compare, *e.g.*, *Wolfe v. Gilmour Mfg. Co.*, 143 F.3d 1122, 1126 (8th Cir. 1998) (same procedure endorsed; verdict of liability and nominal damages affirmed on defendant's cross-appeal), with *Clark v. Trailiner Corp.*, 2000 WL 1694299 (10th Cir., filed Nov. 13, 2000) (unpublished) (attempt, after initiating suit in plaintiff's own name, to reopen bankruptcy for purposes of having trustee *abandon* claim condemned; dismissal upheld).

determined on June 18, 1998, that petitioner had not understood that he had a potential cause of action against respondent and in any event had not understood that any such potential action was an asset to be listed in the bankruptcy case. The bankruptcy judge found petitioner's testimony "very credible." CA3 No. 99-1348 App. 355; CA3 No. 99-1349 App. 508a. The court thus found that petitioner Feist had engaged in no fraud either by omitting the claim from his schedules or by failing to mention it to the trustee at the first meeting of creditors. The bankruptcy court therefore reopened the case under 11 U.S.C. § 350(b), and the U.S. Trustee reappointed co-petitioner Schwartz, the Chapter 7 trustee, to pursue and administer the civil action in district court.

The district court granted respondent's motion to dismiss, although not as presented. The court recognized that petitioner did not lack standing, as he was the injured party and had a legal or at least an equitable interest in the lawsuit, in that he stood to gain from the very substantial value that the cause of action appeared to have in excess of all the claims of his creditors. App. 16-17. Instead, the district court relied on facts developed in discovery and at its own hearing to rule that petitioner was not the "real party in interest" under Fed.R.Civ.P. 17(a) and that the real party, the trustee, could not substitute in after the statute of limitations had run because petitioner had not, in the district court's view, made "an honest mistake" whether he was the real party in interest in bringing the action in his own name. This finding was based on petitioner's supposed "failure" to "eliminate" the "doubts" about his good faith that the district court harbored. App. 29.

The district court made no mention of the bankruptcy court's contrary findings, after a prior hearing on the same subject, that petitioner was "very credible" and had "committed no fraud," either because he did not know that a person collecting worker's compensation might also have a claim against a non-employer third party, or because he failed to understand that a potential civil cause of action was an "asset" which belonged to the bankruptcy estate. Nor did the district court mention the interest of the Chapter 7 creditors in being made whole through a civil recovery.

c. Statement of Lower Court Jurisdiction Under Rule 14.1(i).

The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 28 U.S.C. § 1332, on account of the parties' diversity of citizenship and the amount in controversy. The district court was not deprived of jurisdiction under Article III by virtue of any lack of "standing" in the plaintiff/petitioner. See *Whelan v. Abell*, 953 F.2d 663, 671-73 (D.C.Cir. 1992) (R.B. Ginsburg & Thomas, JJ., on panel) (distinguishing standing issue from real-party-in-interest analysis). The jurisdiction of the court below was properly invoked under 28 U.S.C. § 1291; the order granting "judgment on the pleadings" was "final," and the notice of appeal was timely filed.

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with decisions of other circuits and elevates the language of the Advisory Committee Note over that of Federal Civil Rule 17(a) itself in upholding the dismissal of a valuable personal injury action mistakenly brought by petitioner Feist in his own name, and the concomitant refusal to substitute petitioner bankruptcy trustee as real party in interest to prosecute that case for the benefit of the Chapter 7 creditors.

This Court should grant certiorari to articulate the proper standard for the exercise of discretion under Fed.R.Civ.P. 17(a), when it is discovered during litigation that a federal civil action has been filed by someone who is not the "real party in interest." In this case, the courts below placed a burden on the plaintiff (petitioner Feist) – and thus also on the potential plaintiff, the "real party," petitioner Schwartz, the bankruptcy trustee – to "eliminate . . . doubts" whether Feist had initiated the action in his own name as the result of an "honest mistake." This burden essentially created a presumption against substitution, when the Rule was intended to promote a liberal standard. Other circuits treat substitution in such cases as virtually automatic. The courts below instead elevated a phrase in the 1966 Advisory Committee Note – which does not appear in the Rule itself – into a mandatory test, placed a nearly insurmountable burden on the petitioners to satisfy that invented test, and then dismissed the action because petitioners "failed" it. The ruling was particularly inappropriate in this case, because the impact was felt first by the Chapter 7 creditors, who stood to recover as much as 100% of their claims if the civil action

succeeded, but instead obtained nothing out of petitioner's bankruptcy.

Rule 17(a) itself does not demand the unfair result upheld by the court below. The Third Circuit ruled:

> Although Rule 17 states that '[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for . . . substitution of . . . the real party in interest,' Fed.R.Civ.P. 17(a), substitution is not a matter of right. As the Advisory Committee Notes to the 1966 Amendment of the rule explain, substitution is allowed only
>
> > when an *honest* mistake has been made in choosing the party in whose name the action is to be filed. . . . The provision should not be misunderstood or distorted. It is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.
>
> Fed.R.Civ.P. 17(a), Advisory Committee Notes to the 1966 Amendment (emphasis added). . . .

App. 3-4. The court below thus treated some of the language of the Note as if it were part of the Rule. Yet the court's "only" is its own interpolation, turning a mandate for liberal application of the Rule into a strict barrier. The "honest mistake" phrase appears in a sentence stating, "Modern decisions are inclined to be lenient when an honest mistake has been made. . . . " Neither the Rule nor the Note actually says or even implies that "substitution

is allowed only" to correct for an "honest mistake" or when *any* particular condition exists or does not exist.

Even when a Rule has been redrafted or adopted by Congress, as were the provisions of the Federal Rules of Evidence, excessive reliance on the Advisory Committee Notes has sometimes been controversial in this Court. See *Tome v. United States*, 513 U.S. 150, 160 (1995) (plurality), *id.* at 167-68 (Scalia, J., concurring). In the case of the 1966 Amendments to the Civil Rules, this Court transmitted them to Congress (over published dissents of two Justices; *see* 86 S.Ct. 173, 211, 232-239), but they became law by default six months later, pursuant to 28 U.S.C. §§ 2072-2073, without legislative action. The Advisory Committee Note was neither adopted by the Court nor enacted by Congress.

As one academic commentator noted at the time, the "honest [and] understandable mistake" gloss on Rule 17(a)'s substitutional provision does not appear in "the rule itself"; "as written[,] the bare language appears to give the district court no alternative but to permit a relation back." Sherman Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo.L.J. 1204, 1238 (1966). Accord, 6A Charles A. Wright, Arthur Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1555, at 415 (2d ed. 1990). Although opposed to this approach, Professor Cohn acknowledged that "some courts will apply the rule literally, arguing that since there is no ambiguity, there is no reason to go behind the rule to its 'legislative' history for a clarification." *Id.* While urging that this "result . . . should be avoided *if possible*" (emphasis added), he did not identify any language in the rule,

much less any ambiguity, to justify adding the Note's qualification to the Rule's actual language.[3]

The Note goes on to give two examples of cases where application of the Rule is not intended: the bringing of a fictitious "John Doe" lawsuit where the identity of the true plaintiff is not known to anyone at the time, and the substitution of a plaintiff with a valid claim against the same defendant arising out of the same incident for a different and unrelated plaintiff later found to have no claim at all. The instant case is in no way analogous to either of the Advisory Committee's particular examples of improper applications of the Rule. Nor would allowance of the substitution proposed in this case have defeated the role the Rule plays for the benefit of defendants. The function of the first sentence of Rule 17(a) "is simply to protect the defendant against a subsequent action by the party actually entitled to recover, and to insure generally that the judgment will have its proper effect as res judicata." Adv. Comm. Note (1966). Petitioner Feist's mistaken initiation of the lawsuit in his own

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[3] The other leading treatise, for example, mentions this Advisory Committee language without any elaboration or emphasis, and immediately couples it with a quotation from a district court Rule 17 opinion which cautions against "wooden interpretations [of] the rules of procedure when substantive rights are at stake." 4 *Moore's Federal Practice* § 17.12[1][a], at 17-57 n.2 (3d ed. R. Freer, *et al.*, 2000); quoting *National Safe Corp. v. Texidor Security Equipment, Inc.*, 101 F.R.D. 467, 469 (D.P.R. 1984). *Compare* App. 4 (quoting *Moore's* as if it added authority to position of court below). *See also* Fed.R.Civ.P. 1 (rules to be interpreted to ensure "just, speedy, and inexpensive determination of every action").

name did not threaten these problems *vis a vis* any hypothetical subsequent action by the trustee, as the bankruptcy case was already closed. And upon substitution, of course, any such threat would dissipate anyway.

Wright and Miller do not endorse engrafting an "honest [and] understandable mistake" requirement onto the Rule's language, but do suggest that the Rule "should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice." *Federal Practice & Procedure* § 1555, at 415. None of the examples given in that treatise is at all analogous to the instant case. See *id.* n.11. In this case in particular, justice for the seriously injured petitioner aside, injustice to the creditors of the "no-asset" Chapter 7 bankruptcy could only be avoided by allowing the proposed substitution of the petitioner trustee.

As then-Judge Kennedy wrote for the Ninth Circuit, discussing the issues that arise when a former debtor seeks to bring a pre-bankruptcy cause of action after his discharge which was not listed as an asset:

> ordering a stay [of the civil action] is the most sensible solution to the problems presented by this type of case. A stay would enable a trustee to intervene on behalf of creditors while at the same time permitting [the debtor-plaintiff's] allegations of [tortious behavior] to be fully adjudicated. The only parties benefiting from the absence of a stay are those accused of [wrongdoing].

Stein v. United Artists Corp., 691 F.2d 885, 893-94 (9th Cir. 1982). Dismissal in that case was affirmed only because the plaintiff never sought a stay of the district court

action to allow reopening of the bankruptcy case. Here, by contrast, both petitioners – the former debtor and the trustee – followed all the appropriate procedural rules, and yet were arbitrarily denied the opportunity to pursue a facially valid and valuable claim against respondent. Petitioners have found no precedent, and neither the district court nor the court of appeals cited any, for such a misapplication of Rule 17(a).

Rule 17 was amended in 1966 to endorse and codify "in broad terms the salutary principle of *Levinson v. Deupree*, 345 U.S. 648 (1953), and *Link Aviation, Inc. v. Downs*, 325 F.2d 613 (D.C.Cir. 1963)." 1966 Advisory Comm. Note. The decisions of the courts below cannot be reconciled with the spirit or holding of those cases. In *Levinson*, a unanimous opinion authored by Justice Frankfurter, this Court affirmed a Sixth Circuit judgment which had reversed the dismissal of a maritime wrongful death action. The suit had initially been dismissed because the administrator of the decedent's estate did not have a proper appointment when he brought the lawsuit, and had not corrected the defect until after the statute of limitations had run. This Court held that federal law controlled the issue of amending the complaint to show the proper appointment, and then readily declared "that the administrator should be permitted to do so." 345 U.S. at 652.

The *Levinson* Court cited another unanimous opinion, in which the Court had upheld a verdict based on an amendment to a personal injury complaint adding a jurisdictional fact necessary to sustain a particular federal statutory cause of action arising on the same underlying

facts as those pleaded all along. As Justice Holmes explained for the Court in the earlier case:

> Of course, an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the Statute of Limitations do not exist, and we are of the opinion that a liberal rule should be applied.

New York Central & Hudson Riv. R.R. v. Kinney, 260 U.S. 340, 346 (1915). See also *Foman v. Davis*, 371 U.S. 178, 182 (1962) (abuse of discretion to deny leave to amend complaint to state alternative cause of action on same facts, sought by prompt motion to alter or amend judgment of dismissal for failure to state a claim).

The other case cited favorably in the Advisory Committee Note, *Link Aviation*, an opinion joined by then-Judge Burger, reversed the dismissal of a civil action brought by parties who had already been fully compensated from insurance, and whose claims were all subrogated. The court of appeals presumed – in contrast to the courts below in the instant case – that the plaintiffs "were not suing for a double recovery but to recover for the insurers what the latter had paid." 325 F.2d at 614. Accordingly, the denial of the plaintiff's post-limitations motion to substitute the insurance company as the real party in interest was reversed.

In this case, directly contrary to the language as well as the spirit of Rule 17(a), the courts below placed a burden on petitioner Feist to "eliminate doubts" about whether he had sued in his own name in good faith. App.

29.[4] Under this test, any lingering doubt engendered by ambiguous circumstances was by definition resolved in favor of dismissal rather than of substitution. The Rule, however, is not designed to penalize plaintiffs for errors in bringing suit. It is designed to do justice for injured parties and to minimize the effects of technical defects in pleadings, at least where no unfair prejudice would result to the defendant. Even if a lack of "honest mistake" could defeat the Rule 17(a) process, the burden should have been placed on respondent to prove bad faith, rather than on petitioners Feist and the trustee. And even if somehow that burden was theirs, it could in no event be so onerous a burden as one to "eliminate [all] doubts."

As the Fifth Circuit recently recognized in a case brought on a contested subrogation theory, "If [the original plaintiffs] were not [the real parties in interest], then the trial court's decision to permit the amendment would not only be correct but it would have been required by Rule 17." *Underwriters at Interest on Cover Note v. Nautronix, Ltd.*, 79 F.3d 480, 484 (5th Cir. 1996). The Second Circuit agrees. See *Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (discretion to deny substitution limited to cases "where there was no

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[4] The district court in this case abused its discretion under Rule 17(a) in yet another way, by improperly relying on an adverse inference from petitioner's invocation of attorney-client privilege. *See* App. 21, 29. Other circuits would not allow such an inference to undermine or to aid in the satisfaction of a party's burden of proof. *Nabisco, Inc. v. PF Brands, Inc.*, 191 F.3d 208, 225-26 (2d Cir. 1999); *United States v. Tomaiolo*, 249 F.2d 683, 693-94 (2d Cir. 1957). In the event that this Court grants certiorari, it should also note and condemn this error as well.

semblance of any reasonable basis for the naming of an incorrect party"). "A Rule 17(a) substitution of plaintiffs should be liberally allowed when the change is merely formal and in no way alters the original complaint's factual allegations as to the events or the participants." *Id.* In marked contrast to the courts below, either of these nearly-absolute standards would more accurately capture the proper application of Federal Civil Rule 17(a).

To articulate the appropriate test for substitution of a real party in interest under Rule 17 and to establish that phrases taken from an Advisory Committee Note do not establish otherwise-unwritten requirements for application of the federal rules, as well as to ensure justice for petitioner Feist's innocent creditors, certiorari should be granted and the judgment of the court of appeals should be reversed.

2. The decision below fails to apply this Court's standard for according collateral estoppel effect to a finding of the bankruptcy court.

This Court should also grant certiorari to correct the lower courts' refusal to give collateral estoppel effect to a finding of the bankruptcy court, arrived at after a full and fair hearing. The bankruptcy court ruled that petitioner Feist "committed no fraud" when he failed to schedule his cause of action against respondent for personal injuries upon filing under Chapter 7 for bankruptcy and when he affirmed to the trustee at the first meeting of creditors that he knew of no claim against anyone other than his worker's compensation, at the least. App. 12. Petitioners sought to invoke that finding as an estoppel

against respondent in support of their motions under Fed.R.Civ.P. 17(a) to substitute the trustee as real party in interest to pursue and administer the personal injury action, which Feist had commenced in district court some three months after receiving his Chapter 7 discharge. They contended, via motions for partial summary judgment, that the bankruptcy court finding required a recognition that Feist had acted in good faith despite having mistakenly but honestly initiated the personal injury action in his own name on the basis of a pre-bankruptcy-filing cause of action. This was the only real issue standing in the way of the Rule 17(a) motions.

The district court, without opinion, denied petitioner Feist's motion for partial summary judgment, which relied on the bankruptcy court finding, App. 13, and then granted respondent's motion for "judgment on the pleadings" on the basis of independent factfinding which disregarded the bankruptcy court's determination entirely. App. 14. Affirming, the court of appeals ruled that issue preclusion was inappropriate because the bankruptcy court's finding "is not the same thing as" the "good faith" which the court held controlling on the real-party-in-interest substitution issue. App. 6 n.1. Those rulings disregard this Court's standards enforcing collateral estoppel in the federal courts and undermine the special role of the bankruptcy court in determining matters within its core jurisdiction.

This Court allows both offensive and defensive invocation of collateral estoppel when it would not be unfair to the precluded party, particularly in cases where, as here, there is no problem with respect to mutuality. See generally *Montana v. United States*, 440 U.S. 147, 153-57

(1979); *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Foundation*, 402 U.S. 313 (1971). Respondent chose to appear, by counsel, at the hearing in bankruptcy court to oppose the trustee's motion to reopen the bankruptcy under 11 U.S.C. § 350(b). Respondent called both petitioners as witnesses and had a full opportunity to cross-examine them, as well as to present other evidence. Chief Judge Scholl made clear that he was unwilling to reopen the case, even to administer a significant, newly discovered asset of the estate, if the debtor (petitioner) had been guilty of fraud and reopening the case would now serve primarily to benefit him.[5]

As the bankruptcy court's ruling could only have had this impact if failure to reopen the Chapter 7 case would result in dismissal of the personal injury action, rather than in its continuation in petitioner Feist's own name, the bankruptcy court's factfinding was highly pertinent to the motions then pending in district court in the civil case.

As this Court has recognized:

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a 'right, question *or fact* distinctly put in issue and directly determined by a court of competent

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[5] The court below read Chief Judge Scholl's order as limited to a finding concerning petitioner's conduct in bankruptcy court. While petitioner argued below that the finding extended to his state of mind when initiating the post-bankruptcy civil action as well, a point that respondent had placed in issue at the hearing in bankruptcy court, he need not pursue that interpretation here to prevail.

> jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.' *Southern Pacific R. Co. v. United States*, 168 U.S. 1 (1897).

Montana v. United States, 440 U.S. at 153 (emphasis added). "Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Id.* Accord, *Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979). "Collateral estoppel protects parties from multiple lawsuits and the possibility of inconsistent decisions, and it conserves judicial resources." *Lytle v. Household Manufacturing, Inc.*, 494 U.S. 545, 553 (1990).

In *Montana v. U.S.*, this Court held that the same principles bind non-parties who have had a "full and fair opportunity to litigate," 440 U.S. at 153, matters "in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Id.* at 154. Respondent, although not technically a party in the bankruptcy proceeding, fits that description in this case, and has not argued otherwise. In any event, it was treated in bankruptcy court as a party in interest entitled to participate as a litigant in the hearing on the motion to reopen, and did so. To the extent that a right of appeal is deemed essential to "full and fair litigation," the bankruptcy court's June 18, 1998, order was final and appealable (to the district court) under 28 U.S.C. § 158(a). See *In re Irvin (Irvin v. Lincoln Heritage Life Ins. Co.)*, 950 F.2d 1318, 1319 (7th Cir. 1991); *but cf. Wiswall v. Campbell*, 93 U.S. (3 Otto) 347, 351 (1876) (*res judicata* applies to interim

orders of bankruptcy court, even when not appealable). Yet respondent did not appeal,[6] thus allowing that order to become final as of June 29 (the 28th having been a Sunday in 1998), when the ten days to file a notice of appeal expired. *See* R.Bankr.P. 8002, 9006.[7] The district court litigation all occurred after that date.

There can be no doubt here that the bankruptcy court had "competent jurisdiction" over the former trustee's motion to reopen. *See* 11 U.S.C. § 350(b). Nor is there any question that the issue of whether petitioner Feist "committed [a] fraud" by omitting his potential cause of action against respondent from his schedule of assets (or when he responded to the petitioner trustee's questions at the first meeting) was "actually . . . determined" by Judge Scholl's June 18 order. App. 12. The court below pretermitted the question whether that issue was "necessarily" decided, App. 5 n.1 ("*even if* the bankruptcy court were required to find that [petitioner] Feist had 'committed no fraud' before reopening Feist's bankruptcy case. . . . ") (emphasis added), but that criterion, too, was satisfied here. See *In re Young*, 70 B.R. 968, 16 C.B.C.2d 1090 (Bankr.

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[6] Having been treated at the hearing in bankruptcy court as an intervenor, although not formally a party or creditor, and whose rights were potentially affected by Judge Scholl's order, respondent would have had standing to appeal. See *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam); *Karcher v. May*, 484 U.S. 72, 77 (1987); *Bryant v. Yellen*, 447 U.S. 352, 366-67 (1980).

[7] At worst, even if the order was not "final" in the looser sense in which finality is viewed in bankruptcy appellate practice, respondent could have moved for leave to appeal under 28 U.S.C. § 158(a) and R.Bankr.P. 8001(b), but did not.

E.D.Pa. 1987) (Scholl, J.) (thoroughly discussing discretion of bankruptcy court to reopen a case, and the role of "fraud or intentional design" as a basis for denial of reopening). The bankruptcy court simply would not have reopened the case had it found that petitioner Feist had committed fraud by omitting his cause of action only to file a lawsuit after discharge, and then, having been "caught," was attempting to cash in on that omission post-bankruptcy in a manner that might be aided by the reopening.

The district court entirely disregarded this Court's long-established principle that determinations of the bankruptcy court are entitled to collateral estoppel respect in other courts. See *Katchen v. Landy*, 382 U.S. 323, 334 (1966) (and cases cited, dating back more than a century); *Lesser v. Gray*, 236 U.S. 70, 75 (1915). The court of appeals gave this rule short shrift, looking only to whether the fact question in the two cases was "the same thing," and holding it was not because the bankruptcy court determined petitioner's nonfraudulent state of mind as of January and February 1997, while the issue before the district court – otherwise essentially identical – concerned what petitioner Feist knew and intended between May and July of the same year. App. 6 n.1. This put far too fine a point on the matter, and fell short of explaining why Judge Scholl's finding could therefore be disregarded entirely, even if it only related to the January-February period.

True, the question of petitioner's knowledge and intent in January and February 1997 *vis a vis* his potential claim against respondent is not literally "the same thing" as his knowledge in July 1997 whether he had a right to

sue on that claim in his own name, after being discharged in bankruptcy in April as a no-asset case. But the former is highly relevant to the latter. If in fact petitioner Feist had the knowledge and understanding of his claim against respondent from the very beginning, then surely he did not commit "an honest mistake" when the suit was filed in July. Concomitantly, if the bankruptcy court's finding is accepted, as it should have been, then he is much less likely to have acted in bad faith at the time of filing the civil action, as the district court believed.

The district court did not accept as a premise for its own ruling the bankruptcy court's finding that petitioner had omitted his claim against respondent in the bankruptcy in January and February 1997 entirely innocently. It would then have had to find independently – as there was no basis for it to find – that petitioner Feist had somehow learned in March or later (a) that he did indeed have a valuable claim, *and* (b) that the claim should have been included in his bankruptcy schedule of assets and made available to the trustee to liquidate for the benefit of the creditors, *and* (c) that the claim continued, even after the discharge and closure of the bankruptcy case, to be the property of his "bankruptcy estate" and not of himself personally. Yet unless he knew and understood all those things, and *then* filed suit in his own name in hopes of collecting substantial damages that he could keep all of for himself, he could not be said to have filed in bad faith, as the district court found, rather than as the result of "an honest mistake." In any event, that is not what the district court found.

The district court conducted its own review of evidence developed in discovery and at a redundant hearing and reached factual conclusions which cannot be reconciled with that of the bankruptcy court. The district judge's March 31, 1999, opinion notes that petitioner "incurred the majority of his debt prior to 1994," App. 22, yet did not file the bankruptcy petition until early 1997. The court found it "likely that Plaintiff never previously filed for bankruptcy because he had no assets to protect. When he was injured on August 23, 1995, Plaintiff acquired what he believed was a valuable asset – his claim against Defendant." App. 25. This finding is flatly contrary to that of the bankruptcy court in its June 18, 1998, Order. App. 12.

The district court built on its finding as to petitioner's knowledge and motivation in filing for bankruptcy, which directly violated the collateral estoppel rule, with additional findings which were also inconsistent with the prior ruling of the bankruptcy court. "The aggressiveness with which [petitioner Feist] pursued this litigation immediately after the bankruptcy case was closed also raises questions about Plaintiff's intent," according to the court. App. 25. The judge added:

> Evaluating all of the evidence presented, it is clear that Plaintiff has not sustained his burden of proving that he when filed this action in his own name, he did so in good faith. Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired what he believed was a significant asset makes his stated intentions appear dubious. His subsequent failure to list this claim as an asset in his bankruptcy petition further adds to suspicions about his motivation. . . . The timing of these

> actions by Plaintiff certainly gives the court reason to doubt that when he finally did bring this action in his own name, he did so as the result of an honest mistake.

App. 28-29. The district court thus specifically found, and reiterated, that petitioner Feist knew before filing for bankruptcy that he had a claim against respondent and that this claim constituted a valuable asset, yet failed to disclose it in the Chapter 7 proceedings. This subsidiary yet critical finding cannot be reconciled with the bankruptcy court's.

The court of appeals affirmed, rejecting petitioners' collateral estoppel argument because the two *ultimate* facts at issue were not, in its view, precisely "the same thing." App. 6 n.1. The approach taken by the court below might have arguable support if this were a tax case. Because the tax law environment is always evolving, and because in any given year tax authorities must strive to treat all taxpayers alike rather than give the benefit of some special rule to one taxpayer who may have prevailed on an issue in an earlier year, this Court has applied a very strict rule of identity of issues when collateral estoppel is invoked in tax cases. See, *e.g. Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. U.S.*, 440 U.S. at 158-62; *Comm'r of Internal Revenue v. Sunnen*, 333 U.S. 591, 599 (1948). The circumstances of the instant case are not analogous to such cases; so strict a rule should not have been applied. The fact found by the bankruptcy court – that petitioner Feist "committed no fraud," at least during the bankruptcy proceedings with respect to his claim against respondent – should have been accepted by the district court as the

starting point for its own consideration of the real-party-in-interest issue in the subsequent civil action – the determination of whether petitioner (and his creditors) would be deprived of the benefit of Rule 17(a)'s presumption of automatic substitution with a relation back to the filing date for statute of limitations purposes.

Lay persons often do not understand that an intangible chose in action may constitute an "asset" in bankruptcy, nor that claims pre-dating a bankruptcy filing belong not to them but to the estate, represented by the petitioner trustee. *Cf.* App. 7-8 (observations of bankruptcy judge). "No-asset" Chapter 7 bankruptcies of such persons are very common. The scenario presented by this case, and the issues which must inevitably then arise, are also not unusual. They were resolved by the courts below in a manner which undermines both the judicial authority of the bankruptcy court and the policy of the bankruptcy law to protect innocent creditors while giving honest debtors a fresh start. To clarify and establish the proper role of collateral estoppel principles in the federal district courts when considering matters related to a prior bankruptcy court determination, a writ of certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, petitioners CHRISTOPHER M. FEIST and ANDREW N. SCHWARTZ, CHAPTER 7 TRUSTEE, pray that this Court grant their petition for a writ of certiorari, vacate the judgment below, and remand this case to the United States Court of Appeals for the Third Circuit with instructions to remand to the district court for reinstatement of the civil action and substitution of the trustee, the real party in interest, as plaintiff.

Respectfully submitted,

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TIMOTHY R. COYNE
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Attorneys for Petitioners

January 5, 2001.

UNREPORTED / NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1348 and 99-1349

CHRISTOPHER M. FEIST,
Appellant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE

CHRISTOPHER M. FEIST

v.

CONSOLIDATED FREIGHTWAYS
t/a CF MOTOR FREIGHT

ANDREW N. SCHWARTZ, TRUSTEE
Appellant

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

(Dist. Court No. 97-cv-04719)
District Court Judge: Robert F. Kelly

Submitted Under Third Circuit LAR 34.1(a)
April 11, 2000

Before: NYGAARD, ALITO, and GIBSON,*
Circuit Judges.

(Opinion Filed: May 10, 2000)

MEMORANDUM OPINION OF THE COURT

ALITO, *Circuit Judge*:

Christopher M. Feist appeals the order of the District Court granting judgment on the pleadings for defendant Consolidated Freightways ("CF") in Feist's personal injury action against CF. The District Court held that Feist was not the real party in interest in the lawsuit and that the real party in interest, Feist's bankruptcy estate, could not be substituted under Fed.R.Civ.P. 17(a) because Feist had not made an honest mistake in bringing the action in his own name. We affirm.

Feist brought suit against CF, alleging that CF delivered a loaded pallet to Feist's employer in 1995 and that he was injured during the delivery. Several years before his loading dock accident, Feist had incurred debts of approximately $145,000. Feist had stopped making payments on the "vast majority" of this debt two years before the accident, and it was still outstanding at the time of the accident. App. at 161, 163. Feist filed for bankruptcy in January 1997. He did not list his cause of action against CF as one of his assets, and he told the

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* The Honorable John R. Gibson, United States Court of Appeals for the Eighth Circuit, sitting by designation.

trustee that he had no personal injury claims, although he did say that he was collecting worker's compensation. *See* App. at 688. Feist's debts were completely discharged in April 1997. In May, Feist began to consult with attorneys about a personal injury action against CF, and this lawsuit was filed in July.

Upon learning of the bankruptcy, CF alerted the District Court and pointed out that Feist's cause of action against CF had accrued before the bankruptcy filing. Thus, CF asserted that the bankruptcy estate was the real party in interest. After CF brought Feist's bankruptcy to the District Court's attention, the Court determined that Feist was not the real party in interest and that the real party could not be substituted because Feist had not made an honest mistake when he filed the action in his own name. *See* Br. of Appellant Christopher Feist, Op. of Dist. Ct. at 19 (hereinafter Op.).

Dismissal pursuant to Rule 17 is reviewed for abuse of discretion. *See Icon Group, Inc. v. Mahogany Run Dev. Corp.*, 829 F.2d 473, 476 (3d Cir. 1987). Although Rule 17 states that "[n]o action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for . . . substitution of . . . the real party in interest," Fed.R.Civ.P. 17(a), substitution is not a matter of right. As the Advisory Committee Notes to the 1966 Amendment of the rule explain, substitution is allowed only

> when an *honest* mistake has been made in choosing the party in whose name the action is to be filed. . . . The provision should not be misunderstood or distorted. It is intended to

> prevent forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.

Fed.R.Civ.P. 17, Advisory Committee Notes to the 1966 Amendment (emphasis added); *see also* 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1555, at 412 (2d ed. 1990) ("The final sentence in Rule 17(a) is designed to avoid forfeiture and injustice when an *understandable* mistake has been made in selecting the party in whose name the action should be brought.") (emphasis added); 4 Richard D. Freer, *Moore's Federal Practice* § 17.12[1][a], at 17-55 to -56 (3d ed. 1999) ("This provision 'is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an *understandable* mistake has been made.' ") (quoting the Advisory Committee Note, emphasis added).

Feist's bankruptcy was closed on May 7, 1997. On May 30, 1997 he hired counsel to bring his cause of action against CF. At his deposition, he refused to testify whether he told his counsel about the bankruptcy case. The District Court held that "[t]he aggressiveness with which [Feist] pursued this litigation immediately after his bankruptcy case was closed . . . raises questions about Plaintiff's intent." Op. at 13. The Court noted that while Feist consulted four attorneys immediately after the bankruptcy closed, he had not consulted any attorneys in 20 months between the injury and the bankruptcy discharge. *See id.* The Court found Feist's explanations for the delay in filing the action to be inconsistent. The Court contrasted Feist's testimony in his first deposition – that although he always believed CF was responsible for his

injury, he delayed in suing CF because he did not want to "go after anybody," App. at 838a – with his direct testimony to the District Court, in which Feist said that he was "very surprised" by his uncle's suggestion that he sue CF, *see* App. at 975a. The District Court held that Feist had not shown that he made an honest mistake when he filed the action in his own name:

> Evaluating all of the evidence presented, it is clear that Plaintiff has not sustained his burden of proving that when he filed this action in his own name, he did so in good faith. Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired what he believed was a significant asset makes his stated intentions appear dubious. His subsequent failure to list this claim as an asset in his bankruptcy petition further adds to suspicions about his motivation. Moreover, Plaintiff began an aggressive search for an attorney immediately after his bankruptcy case was closed. The timing of these actions by Plaintiff certainly gives the Court reason to doubt that when he finally did bring this action in his own name, he did so as the result of an honest mistake.

Op. at 16-17. Under these circumstances, we cannot say that the District Court abused its discretion.[1] We also

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[1] Feist asserts that since the order of the bankruptcy court stated "that the debtor committed no fraud," App. at 368, the District Court is estopped from finding that Feist did not make an honest mistake in filing the action in his own name. However, even if the bankruptcy court were required to find that Feist had "committed no fraud" before reopening Feist's bankruptcy case under 11 U.S.C. § 350(b), it would not be

hold that Feist's argument that the trustee must be substituted in this action to avoid injustice is without merit.[2] Accordingly, we affirm the order of the District Court granting judgment on the pleadings to CF.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ Samuel A. Alito
Circuit Judge

MAY 10 2000

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binding on us because a finding by the bankruptcy court that Feist had not committed fraud when he failed to list his cause of action against CF as an asset in his bankruptcy or when he told the trustee that he had no personal injury claims is not the same thing as a finding that Feist did not make an honest mistake in filing the action in his own name. We note that this action was filed on July 21, 1997, significantly after the events considered by the bankruptcy court, as the bankruptcy filing took place on January 3, 1997, and the meeting with the trustee took place on February 24, 1997. Thus, the bankruptcy court's finding that Feist had "committed no fraud" has no preclusive effect here.

[2] Feist contends that forbidding substitution would be unjust because the trustee will be barred from bringing the action in his own name, as the statute of limitations has run. Under this interpretation of injustice, substitution would have to be allowed in all cases in which the statute of limitations had expired. We find this interpretation unpersuasive, as it renders Rule 17 inoperative when the statute has run and a mere formality in cases where relation back is not required to maintain the action.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BEFORE THE HONORABLE DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE

IN RE: :
: NO. 97-10624 (7)
CHRISTOPHER FEIST :

Philadelphia, Pennsylvania
June 18, 1998

* * * *

[45] THE COURT: * * * I mean it's one thing to understand that you have an injury, it's another thing to understand what rights you might have as a result of that.

As I understand what the debtor is saying, is that he never understood that he had any rights other than through the workmen's compensation program which frankly myself I would have – because I don't know this field – I wouldn't have been sure myself.

In fact, I was on [L]egal [L]ine last night and somebody asked me a question that was similar to this[,] and I am quite aware of the fact that I don't really know the law in this area, you know, as old as I am. You know, somebody was asking me whether they could bring an

action of some kind when they were hurt on the job[,] and it's a very confusing area.

MS. BROWN [ATTORNEY FOR CF]: And the –

THE COURT: And I think that fairly what the debtor is saying is yes, he knew he was hurt, he knew what the accident was, he knew it occurred, he didn't know that he could possibly bring an independent action against –

MS. BROWN: But that's not what his testimony [46] disclosed. * * *

* * * *

THE COURT: * * * I think – well, I don't see any inconsistency, I really don't. I feel very strongly just the way I did at the outset. You know, you're just trying to use this as a gambit to get out of liability.

MS. BROWN: Well, I think –

THE COURT: And I just don't think it's going to fly. If it flies with the District Court irrespective of what I say, so be it, you know.

And I don't know – I'm not clear why you're arguing this before me because if it's an argument you're making [47] before the District Court, does anybody care what I say on this subject?

MS. BROWN: Absolutely the District Court cares what you say, because clearly –

THE COURT: Well, they haven't – no one has contacted me from the District Court and said Judge Scholl or had sent me an order or anything that said,

"Judge Scholl, I want you to make a determination of this issue because it's very important" –

MS. BROWN: Well, that, your Honor –

THE COURT: – "it's very important I have to decide."

MS. BROWN: It's probably not (inaudible). And I'm telling you now we have pending before Judge Kelly a motion to dismiss the case based on the lack – based on the plaintiff's lack of standing and that was argued last Wednesday.

And at that time Mr. Jokelson did and I did inform the court that this hearing was about to happen, so Judge Kelly is very aware that you will make a decision about whether the case is reopened or not.

And I think at that point Judge Kelly has to decide whether he dismisses the case or he waits unless the trustee (inaudible,) so that issue is before him.

THE COURT: Well, I guess so, but I don't know that [48] Judge Kelly sent it back to me and wanted me to test whether I thought that debtor was involved in fraud or not.

MS. BROWN: No.

THE COURT: I really don't think he was if you want my own opinion. I could be wrong. I mean obviously people do things all the time, but I didn't get any flavor here in that. I mean the debtor's explanation to me was perfectly understandable.

It's unfortunate though because you would like people to have antenna that would tell them, you know, that

they really should inform everybody about this, but on the other hand I can understand why it sometimes happens that they don't.

And this seems to me that I accept the debtor's explanation as far as that goes. But, you know, I don't know if Judge Kelly is waiting for me to tell him all of that.

MS. BROWN: No, I don't –

THE COURT: I suppose he could still decide that it should be dismissed for some reason.

MS. BROWN: Absolutely, your Honor.

THE COURT: I'll tell you what. Depending on what I heard, I kind of hope he doesn't, you know, because I don't get that feeling about it at all. But okay.

Now what's going to happen now? You're not appointed as the trustee. I know I can't appoint you as the [49] trustee even though you're here in some capacity. * * *

* * * *

THE COURT: Well, obviously what's – what's going to happen is – I mean there is going to be more than that. What is going to happen is, there is going to be a trustee appointed and it probably will be Mr. Schwartz.

And then the trustee – you'll probably try to negotiate with the trustee because you figure that the trustee is more likely to settle –

MR. SCHWARTZ: Special counsel may be coming to this case.

[50] THE COURT: Oh, you mean Mr. Jokelson?

MR. SCHWARTZ: Probably Mr. Jokelson.

THE COURT: Or the other – well, whoever. But there might be an attempt to settle the case and the thought might be – and then you're logical to think that the trustee who isn't as concerned about, you know, vindicating rights, it's just about money[,] might be more amenable to settlement. I don't know. So all that will happen.

Well, okay. I ought to schedule a further status hearing on it though. I guess some time maybe in July because there's quite a bit happening, you know, in the case. Let's stick it on July 28th, I think that will be a nice quiet day, you'll have plenty of time.

Okay. We will grant the motion though. Presumably the U.S. Trustee will tell us who the trustee will be, you know. A good chance it will be Mr. Schwartz. Okay.

(Proceedings concluded at this time.)

* * *

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	:	CHAPTER 7
CHRISTOPHER M. FEIST	:	
Debtor	:	BANKRUPTCY NO. 97-10624DAS

ORDER

AND NOW, this 18th day of June 1998, upon consideration of the Motion of Trustee to Reopen Case, Withdraw No Asset Report, For Reappointment of a Trustee Pursuant to 11 U.S.C. §350 and Bankruptcy Rule 5010 and Request for Expedited Hearing, after notice and hearing, [finding, after a hearing of this date, that the Debtor committed no fraud, and that the Objections of Consolidated Freightways are self-serving and lack merit,*] it is hereby

ORDERED that the case is reopened, that the No Asset Report is withdrawn, and that the Office of the U.S. Trustee may reappoint a Trustee to administer the assets. [A status hearing in this case is scheduled on July 28, 1998.*]

BY THE COURT

/s/ David A. Scholl
DAVID A. SCHOLL
CHIEF UNITED STATES
BANKRUPTCY JUDGE

Interested parties:
(See attached list)

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* Bracketed material appears in original in Judge's handwriting.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER M. FEIST, Plaintiff, v. CONSOLIDATED FREIGHTWAYS CORPORATION, t/a CF Motor Freight, Defendant.	CIVIL ACTION No. 97-4719

ORDER

(Filed Nov. 13, 1998)

AND NOW, this 13th day of Nov., 1998, upon consideration of Defendant Consolidated Freightways Corporation's Response to Plaintiff's Motion for Summary Judgment, it is hereby ordered and decreed that Plaintiff's Motion for Summary Judgment is **DENIED.**

/s/ Robert F. Kelly
Robert F. Kelly, U.S.D.J.

ENTERED: 11/16/98
CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER FEIST	:	CIVIL
	:	ACTION
v.	:	
	:	NO. 97-4719
CONSOLIDATED FREIGHTWAYS	:	
CORP., t/a CF Motor Freight	:	

ORDER

(Filed Mar. 31, 1999)

Before the Honorable Robert F. Kelly

AND NOW, this 31st day of March, 1999, in accordance with the Court's Memorandum and Order on this date granting above defendant's motion for judgment on the pleadings,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendant and against the plaintiff.

BY THE COURT

ATTEST: /s/ Thomas Garrity
Thomas Garrity
Deputy Clerk

Civ 1 (8/80)

ENTERED: 3/31/99

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHRISTOPHER M. FEIST, Plaintiff,	:	CIVIL ACTION
v.	:	No. 97-4719
CONSOLIDATED FREIGHTWAYS CORPORATION t/a CF Motor Freight,	:	
Defendant.	:	

MEMORANDUM

(Filed Mar. 31, 1999)

ROBERT F. KELLY, J. MARCH 3, 1999

This is an action for personal injuries alleged to have been sustained by the Plaintiff. It was proceeding to trial in the ordinary course when Defendant, Consolidated Freightways, discovered that Plaintiff brought this action, in his own name, after having filed a petition in bankruptcy. The Defendant has filed a Motion to Dismiss contending that the Plaintiff is not the real party in interest. Plaintiff has filed a Motion to Substitute the Real Party in Interest, The Trustee in Bankruptcy.

A. THE EFFECT OF PLAINTIFF'S BANKRUPTCY.

The filing of a bankruptcy petition creates an estate that generally includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Any causes of action that accrue to the debtor prior to the filing of the bankruptcy

petition are property interests included in the estate. *Integrated Solutions, Inc. v. Service Support Specialties, Inc.*, 124 F.3d 487, 491 (3d Cir. 1997); *Cain v. Hyatt*, 101 B.R. 440, 441-42 (E.D. Pa. 1989). A cause of action need not be formally filed prior to the commencement of a bankruptcy case to become property of the estate. *Lawrence v. Jackson Mack Sales, Inc.*, 837 F. Supp. 771, 779 (S.D. Miss. 1992), *aff'd*, 42 F.3d 642 (5th Cir. 1994). After a claim becomes part of the bankruptcy estate, only the bankruptcy trustee, as representative of the estate, has the authority to prosecute or settle the cause of action. *Chrysler Credit Corp. v. B.J.M., Jr., Inc.*, 834 F. Supp. 813, 839 (E.D. Pa. 1993); *Cain*, 101 B.R. at 442.

There is no dispute in this case that Plaintiff's claim against Defendant accrued prior to the filing of his bankruptcy petition. When Plaintiff commenced his bankruptcy case, this claim became the property of the bankruptcy estate. Therefore, any claim by Plaintiff against Defendant arising out of the incident that took place on August 23, 1995, no longer belongs to Plaintiff. Rather, it is the property of the bankruptcy estate.

In its Motion for Judgment on the Pleadings, Defendant first argued that this suit should be dismissed because of Plaintiff's apparent lack of standing. While there is much confusion surrounding the distinction between the doctrine of standing and the principle of the real party in interest, it is clear that this suit presents an issue involving the latter.

Generally, standing involves a determination of "whether the plaintiff can show an injury in fact traceable to the conduct of the defendant." *Firestone v. Galbreath*,

976 F.2d 279, 283 (6th Cir. 1992) (citing *Allen v. Wright*, 468 U.S. 737 (1984)). Because Plaintiff was the individual who suffered the injury alleged in the Complaint, he meets the requirements of standing. In contrast, the real party in interest principle requires that "Every action shall be prosecuted in the name of the real party in interest." FED. R. CIV. P. 17(a). This principle is a means to identify the person who possesses the right sought to be enforced. *Firestone*, 976 F.2d at 283. Plaintiff is not the real party in interest because, upon the filing of his bankruptcy petition, this claim became the property of the bankruptcy estate and now can only be maintained by the bankruptcy trustee. *See Lawrence*, 837 F. Supp. at 779.

B. RULE 17(a).

In addition to requiring all actions to be prosecuted in the name of the real party in interest, Rule 17(a) provides:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

FED. R. CIV. P. 17(a). While a literal interpretation of this portion of Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff was named, the

Advisory Committee's Notes make it clear that this provision "is intended to prevent forfeiture when determination of the proper party to sue is difficult or when an understandable mistake has been made."[1] FED. R. CIV. P. 17 Advisory Committee Notes, 1966 Amendment; *see also Nelson v. County of Allegheny*, 60 F.3d 1010, 1015 n.8 (3d Cir. 1995); *United States ex rel. Wulff v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989); *Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 180 (W.D. La. 1970). When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed. 6A Charles Alan Wright et al., *Federal Practice and Procedure* § 1555 (1990) ("Wright & Miller"); *see also Advanced Magnetics, Inc. v. Bayfront Partners, Inc.*, 106 F.3d 11, 20 (2d Cir. 1997) (noting that the district court retains discretion to dismiss an action where there was no reasonable basis for naming an incorrect party); *Whitcomb v. Ford Motor Co.*, 79 F.R.D. 244, 245 (M.D. Pa. 1978) (noting that Rule 17 contemplates dismissal of an action not prosecuted by the real party in interest). Further, this portion of Rule 17(a) "should be applied only to cases in which substitution of the real party in interest is necessary to avoid injustice." 6A Wright & Miller § 1555; *Automated Info. Processing, Inc. v. Genesys Solutions Group, Inc.*, 164 F.R.D. 1, 3 (E.D.N.Y. 1995).

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[1] For a further discussion of the necessity of an honest mistake in order for a court to permit substitution under Rule 17(a), see Sherman L. Cohn, *The New Federal Rules of Civil Procedure*, 54 Geo. L.J. 1204, 1238 (1966).

Based upon this analysis, it is evident that Rule 17(a) should not be applied blindly to permit substitution of the real party in interest in every case. In order to substitute the trustee as the real party in interest, Plaintiff must first establish that when he brought this action in his own name, he did so as the result of an honest and understandable mistake. The Advisory Committee Notes to Rule 17(a) provide examples of situations in which substitution would not be permissible:

> [This provision] does not mean, for example, that, following an airplane crash in which all aboard were killed, an action may be filed in the name of John Doe (a fictitious person), as personal representative of Richard Roe (another fictitious person), in the hope that at a later time the attorney filing the action may substitute the real name of the real personal representative of a real victim, and have the benefit of suspension of the limitation period. It does not even mean, when an action is filed by the personal representative of John Smith, of Buffalo, in the good faith belief that he was aboard the flight, that upon discovery that Smith is alive and well, having missed the fatal flight, the representative of James Brown, of San Francisco, an actual victim, can be substituted to take advantage of the suspension of the limitation period.

FED. R. CIV. P. 17 Advisory Committee Notes, 1966 Amendment. Therefore, it is necessary for this Court to determine whether or not Plaintiff was acting in good faith when he filed this action in his own name. If Plaintiff did not make an honest and understandable mistake when he filed this action in his own name, this Court will not allow substitution of the real party in interest.

C. FACTUAL BACKGROUND.

On August 23, 1995, Plaintiff was at his place of employment, Jay Telephone Vending, Inc. While assisting in the unloading of freight delivered by Defendant, Plaintiff allegedly sustained severe injuries. Two to three hours later, Plaintiff went home because he was in pain. After spending four days in bed, he sought medical attention. Plaintiff never returned to work, and he began receiving worker's compensation several months later.

On July 21, 1997, Plaintiff filed a complaint against Defendant based upon the injuries he sustained on August 23, 1995. Trial was set to commence on July 6, 1998. During May of 1998, Defendant became aware that Plaintiff had filed a petition in bankruptcy during 1997. On June 3, 1998, this Court granted Defendant leave to engage in limited discovery on this new issue.

This discovery revealed that on January 16, 1997, nearly one year and five months after his injury, Plaintiff filed a Chapter 7 Petition in Bankruptcy. In his petition, Plaintiff listed 82 creditors holding unsecured non-priority claims in the amount of $155,887.54. The petition further disclosed personal property in the amount of $6,125.00. Plaintiff did not, as was required, list his claim against Consolidated Freightways in his bankruptcy petition. Further, when asked by the trustee at the meeting of creditors whether he had "any claims against anyone for any reason whatsoever," Plaintiff replied "nothing." (*See* Pl.'s Post Hr'g Br. Ex. 6 at p. 13.) On April 30, 1997, Plaintiff received a discharge of all of his debts, and his bankruptcy case was closed on May 9, 1997.

Plaintiff immediately sought an attorney to pursue any possible claim he might have against Defendant. In the weeks following the discharge of his debts, Plaintiff contacted four attorneys with respect to this claim. In the second or third week of May, 1997, Plaintiff contacted the attorneys who represented him just prior to trial ("trial counsel"). Trial counsel was retained on May 30, 1997.

At a deposition, Plaintiff testified that after his bankruptcy discharge, but prior to retaining trial counsel, he met with the three other attorneys to discuss possible claims against Defendant in this action. He further testified that he never informed any of the three attorneys that he had recently filed a bankruptcy petition.[2] (Dep. of Christopher Feist, 6/12/98, at pp. 112-35.) When asked whether he had informed any attorney from the trial counsel firm of his bankruptcy, Plaintiff asserted the attorney-client privilege and refused to answer. (*Id.* at pp. 126-27.) Similarly, at the deposition of trial counsel, Plaintiff (through other counsel) again asserted the attorney-client privilege when his trial counsel was asked if Plaintiff had ever informed him of the bankruptcy petition.[3] (Dep. of trial counsel at pp. 22-26.)

Plaintiff gave various reasons at his depositions and at the evidentiary hearing as to why he waited until nearly two years after the date of his accident to see an attorney. When asked at his first deposition why he

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[2] At the deposition, Feist also discussed his communications with his bankruptcy attorney. (Dep. of Christopher Feist, 6/12/98, at pp. 69-88.)

[3] The Court was never asked to rule on these claims of attorney-client privilege.

decided to see an attorney in May of 1997, Plaintiff responded that it was because he "got to a point of just utter frustration and realizing I wasn't getting better and the doctors weren't able to do anything for me and I just realized that my life could be like this for as long as I'm alive." (Dep. of Christopher Feist, 3/18/98, at pp. 143-44.) At his later deposition, Plaintiff testified that he did not pursue a claim against Defendant sooner because "[t]he whole concept of having a claim against Consolidated Freightways didn't even enter my mind at that point." (Dep. of Christopher Feist, 6/12/98, at p. 93.) At the hearing, Plaintiff testified "I had no idea I could sue anybody. I mean, first of all, that wasn't my main focus, and secondly, I just thought I was receiving workers' comp and that was my rights, that was it." (N.T. 11/19/98 at pp. 25-26.)

D. DISCUSSION.

In evaluating the evidence relevant to the issue of whether or not Plaintiff filed this Complaint in good faith, the timing of particular events plays a crucial role. Plaintiff incurred the majority of his debt prior to 1994. While his Chapter 7 petition filed in 1997 lists claims in excess of $155,000.00, more than $145,000.00 of that amount was incurred in 1993 or earlier. It is remarkable that, given this substantial amount of debt, Plaintiff waited until 1997 to file his bankruptcy petition.

When asked what led him to file the bankruptcy petition, Plaintiff testified at his deposition: "Well, I had planned on maybe applying for relief under the bankruptcy law for a couple of years before this. . . . I kept

putting it off because I thought maybe some how, some way, I'd get things together and be able to take care of it." (Dep. of Christopher Feist, 6/12/98, at pp. 10-11.) At the evidentiary hearing, Plaintiff's counsel argued:

> If Mr. Feist wanted to get rid of his creditors from '91 to '93, and if it only takes four, five months to get rid of them, he would have gone and filed the bankruptcy in 1993 or 1994 or 1995, and there never would have been a creditor problem later. Instead what he did was the other thing. He tried to pay them.

(N.T. 11/19/98 at p. 112.) Thus, Plaintiff contends that despite the fact that the vast majority of his debt was incurred prior to 1994, he delayed filing bankruptcy until 1997 because he was attempting to repay his creditors.

But Plaintiff's own testimony casts doubt upon this purported reason for the delay. At his deposition, Plaintiff testified that he had stopped making payments to the vast majority of his creditors in 1992 or 1993. (Dep. of Christopher Feist, 6/12/98, at p. 29.) Plaintiff shed further light upon his intentions regarding his debts when he was asked if he had notified his creditors of a change in his address:

> Q: I guess what I want to know, though, Mr. Feist, is to the extent the creditors were corresponding with you in Vegas, at some point you left Vegas and you moved back home to Philadelphia. Did you notify those creditors so that they could continue to correspond with you in Philadelphia?
>
> A: Well, by that time I had already talked to my creditors and told them that I can't pay the debts.

Q: So is the answer no, that you didn't notify them?

A: I don't recall if I did or not, because I never actually changed anything beyond talking to them and telling them I couldn't pay the debts. Mostly all of them got in touch with me.

Q: I'm sure they did.

A: And I told them all the same thing. I can't pay the debts.

Q: And this would be in 1992-'93?

A: And I told them to stop calling me and harassing me, things of that nature. And by law, they had to stop doing that.

(*Id.* at pp. 38-39.) Based upon his own testimony, Plaintiff did not notify his creditors that he had moved to Philadelphia.[4]

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[4] Plaintiff actually testified that the word "move" did not accurately describe the way in which he was "predominantly spending a lot of time in Philadelphia" beginning in August, September, or October of 1993. (*See* Dep. of Christopher Feist, 6/12/98, at pp. 32, 40.) Rather, he maintained that he was perpetually transient, alternately or simultaneously living in Las Vegas, Salt Lake City, and Philadelphia:

Q: Where was your residence at that point in time, spring of '92?

A: What do you mean my residence?

Q: Where you were living, where you could vote.

A: Well, I didn't vote during those years, because my main residence is in Pennsylvania. I went out there [Las Vegas and Salt Lake City] to do some business. And when I was out there, I stayed in

Indeed, he had informed his creditors that he was unable to repay them. It seems rather unlikely, then, that Plaintiff intended to repay his creditors when he had already informed them that he would not pay his debts and had failed to notify them of his change of address. Further, the fact that Plaintiff told his creditors to stop calling him because he knew that "by law, they had to stop doing that" shows a certain amount of sophistication on his part regarding management of his debts.

Thus, it is doubtful that Plaintiff delayed his bankruptcy petition because he was attempting to repay his creditors. It is more likely that Plaintiff never previously filed for bankruptcy because he had no assets to protect. When he was injured on August 23, 1995, Plaintiff acquired what he believed was a valuable asset – his claim against Defendant. Despite any previous occasions on which Plaintiff considered filing a bankruptcy petition, it was only after his acquisition of this asset that he actually sought relief in bankruptcy court.

The aggressiveness with which he pursued this litigation immediately after his bankruptcy case was closed also raises questions about Plaintiff's intent. Plaintiff testified that within the three weeks following the close of his bankruptcy case he spoke with four different attorneys regarding a possible claim against Defendant. Within just a few weeks he had retained counsel and filed

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> different places. I had a place, you know, that I stayed in Vegas. I had a place that I stayed in Utah. And I had a place that I stayed in Pennsylvania.

(*Id.* at p. 36.)

a lawsuit. In contrast, during the first one year and eight months following his injury, he did not speak with a single attorney regarding potential claims against Defendant. It was only after his substantial debts were discharged by the bankruptcy court that Plaintiff actively pursued this claim.

The questions that are naturally raised by the swiftness with which Plaintiff sought legal representation after his bankruptcy case was closed are not fully answered by Plaintiff's testimony. When asked at his first deposition what led him to seek an attorney, Plaintiff testified:

> A: Well, it was mostly the fact what that guy did that day with the trucking company, the whole way he orchestrated what we were going to do, how we were going to do it, how much of a hurry he was in. . . .
>
> Q: I understand what you're saying and your reasons for pursuing the claim. I guess my question goes to the timing of it. Why in May of '97 were you making that decision?
>
> A: Well, by May of '97 it had already been close to well past a year, and my first reaction to this whole thing which dominated what happened to me, which dominated how I felt after it happened to me, was just to hide in the corner and just isolate myself and just try to handle it myself. When I got to a point of just utter frustration and realizing I wasn't getting better and the doctors weren't able to do anything for me and I just realized that my life could be like this for as long as I live. . . .

> Q: At some point in time you came to the conclusion that this trucker orchestrated the situation?
>
> A: I knew that from the beginning. The thing was I was hoping to get better and as time went on I got so depressed and isolated myself to such an extent. I didn't want to try to get involved in the courts or go after anybody.

(Dep. of Christopher Feist, 3/18/98, at pp. 142-45.) At his second deposition, Plaintiff stated that he did not list this claim on his bankruptcy petition because he "had no knowledge of having any claim against anybody other than receiving workers' comp." (Dep. of Christopher Feist, 6/12/98, at p. 91.) Plaintiff went on to testify that he did not believe he had any claim against Defendant until May of 1997, following a conversation with his uncle. (*Id.* at pp. 93-98.) At the evidentiary hearing, Plaintiff gave more details as to the events leading up to his decision to seek an attorney after his worker's compensation carrier scheduled an independent medical examination:

> Once I found out about that [the medical examination], I talked to my uncle when I had seen him one day or talked to him on the phone one day and I said to him, said, you know, what am I going to do about workers' comp? I said, you know, I don't know what they are going to try to do to me or what, and I'm really scared because I'm not getting any better. I said and I have read about this in like this thing I saw, this pamphlet, and I said what do I do, what should I do. And he said it might be a good idea to call an attorney and start asking some questions about that and the other – and the other thing. And I said

> to him what other thing, and he said the trucking company, the third-party thing or something like he said. And I said what are you talking about, and he said maybe you have a third-party case or something to that effect. And I said do you really think I do? And I was very surprised, you know that he said that and he said, it doesn't hurt to ask.

(N.T. 11/19/98 at p.32.) Thus, Plaintiff maintained at the hearing that actions taken by his worker's compensation carrier prompted a conversation with his uncle that led him to interview attorneys.

While Plaintiff's testimony at the second deposition and his testimony at the hearing do not directly contradict his testimony at the first deposition, it is somewhat puzzling that the only reason he originally gave for his delay in seeking an attorney was that he "didn't want to try to get involved in the courts or go after anybody." Yet, after Defendant discovered that Plaintiff had filed a bankruptcy petition, Plaintiff testified at the second deposition and at the hearing that his delay was also caused by the fact that he did not believe he had any claim against Defendant until May of 1997. He further testified that a conversation with his uncle prompted his search for an attorney, a fact that he did not state at his first deposition despite the fact that he was asked what led him to seek an attorney.

Evaluating all of the evidence presented, it is clear that Plaintiff has not sustained his burden of proving that when he filed this action in his own name, he did so in good faith. Plaintiff's lack of interest in filing a petition in bankruptcy for several years until after he had acquired

what he believed was a significant asset makes his stated intentions appear dubious. His subsequent failure to list this claim as an asset in his bankruptcy petition further adds to suspicions about his motivation. Moreover, Plaintiff began an aggressive search for an attorney immediately after his bankruptcy case was closed. The timing of these actions by Plaintiff certainly gives the Court reason to doubt that when he finally did bring this action in his own name, he did so as the result of an honest mistake.

Plaintiff's explanations fail to eliminate these doubts. His testimony as to the reason for his delay in filing bankruptcy is contradicted by other testimony in the record. He offered additional reasons to explain his delay in filing this case only after Defendant discovered his bankruptcy. Further, while Plaintiff readily provided testimony that he never told the three attorneys he previously interviewed in May of 1997 about his bankruptcy case, he did not answer that question as to his present counsel. Thus, I find that Plaintiff has failed to carry his burden to prove that the filing of this case in his own name was an honest mistake. Plaintiff will not be permitted to substitute the trustee as the real party in interest. To allow a substitution where a plaintiff cannot establish that he was acting as the result of an honest mistake would contravene the purpose of Rule 17(a).

The bankruptcy trustee contends (along with Plaintiff) that if substitution is not permitted in this case, it is Plaintiff's creditors who will suffer most, as they received nothing during his original bankruptcy case and could receive nothing now. These concerns were raised by Judge Stapleton in *Oneida Motor Freight, Inc. v. United*

Jersey Bank, 848 F.2d 414, 422 (3d Cir. 1988) (Stapleton, J., dissenting). The *Oneida* case is similar in some ways to the case now before this Court. In *Oneida*, a Chapter 11 debtor failed to disclose to the bankruptcy court a potential claim against one of its creditors. After the court confirmed the debtor's reorganization plan, the debtor brought an action against the creditor. The court of appeals, in affirming dismissal of the case, found that the debtor's failure to disclose its potential claim during its bankruptcy case precluded a later independent action on the claim by the debtor. *Id.* at 419. Further, the court held that the debtor was judicially estopped from bringing its claim because its suit indicated a position contrary to that taken by the debtor in its Chapter 11 case. *Id.* Despite the concerns raised by the dissent that it produced a harsh result for the creditors, the court held that the debtor was not permitted to bring its claim. *Id.* at 420. Thus, the interest of Plaintiff's creditors in recovering some of the debts owed to them is not sufficient to justify substitution of the bankruptcy trustee as the real party in interest in this case.

E. CONCLUSION.

Plaintiff has failed to sustain his burden of proof which required that he demonstrate that when he filed this action in his own name it was the result of an honest mistake. This Court will not come to the aid of a plaintiff under circumstances such as this where plaintiff cannot prove that his prior actions were done in good faith. Because the Plaintiff is not the real party in interest, he is unable to state a claim upon which relief can be granted.

Therefore, Defendant's Motion for Judgment on the Pleadings will be Granted.

I therefore enter the following Order.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 99-1348 and 99-1349

CHRISTOPHER M. FEIST,

Appellant

v.

CONSOLIDATED FREIGHTWAYS CORPORATION
t/a CF MOTOR FREIGHT

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, GREENBERG, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, and FUENTES *Circuit Judges*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ Samuel A. Alito
Circuit Judge

DATED: AUG 10 2000

ch/cc: RDH
DEJ
AWA
MKB
DBF
TRC
JEO